The Rise of Disability Discrimination Claims

By Diana Friedland

The Equal Employment Opportunity Commission recently released its latest charge-filing statistics, showing never before seen levels of disability discrimination complaints — more than 25,000 in Fiscal 2010 — which accounted for one-quarter of all charges filed with the EEOC that year. The level of disability discrimination charges rose faster than any other type of discrimination complaints, jumping 17 percent from the record set the year before.

These numbers should send a message to employers about the major exposure they could face if they overlook their obligations under disability-related employment laws. In fact, recent California cases and administrative agency developments confirm that employers who fail to understand and comply with these laws risk substantial monetary liability.

In a seminal case, the state Supreme Court in *Roby v. McKesson Corp.*, 47 Cal. 4th 686 (2010), underscored that violations of disability discrimination laws may expose employers to significant liability when it approved a nearly $4 million judgment in favor of a disabled employee. In that case, the plaintiff, who worked in defendant's customer service department for 12 years and consistently received favorable performance reviews, began experiencing panic attacks, which caused her to suffer frequent heart palpitations, shortness of breath, trembling, and dizziness. To control these symptoms, she began taking medication, which made her body produce an unpleasant odor and caused her to dig her fingernails into her skin, producing open sores.

The defendant's attendance policy required employees to provide 24-hour advance notice for all absences, without exception. Employees who failed to provide advance notice received progressive levels of discipline, from warnings to termination. As a result of the plaintiff's medical condition, she was often unable to comply with this policy and accrued a large number of absences. These absences created tension between the plaintiff and her supervisor, who was aware of the plaintiff's condition but nevertheless ostracized her in the office by, among other things, ignoring her at staff meetings, calling her "disgusting," and reprimanding her in front of coworkers. Ultimately, the company fired the plaintiff on the grounds that she abused the attendance policy.

The plaintiff sued the company for disability discrimination, harassment, wrongful termination, and failure to accommodate. A jury returned a verdict in her favor totaling almost $20 million, which the Supreme Court reduced to nearly $2 million in compensatory damages and the same amount in punitive damages.

Later that year, the Court of Appeal in *Sandell v. Taylor-Listug Inc.*, 188 Cal. App. 4th 297 (2010), reversed summary judgment in favor of the employer on a disability discrimination claim. In that case, shortly after Robert Sandell began working as vice president of sales at defendant's guitar manufacturing company, he suffered a stroke and thereafter needed a cane to walk and spoke noticeably slower. The company fired him three years later.

The company stated that it terminated Sandell because sales dropped during his leadership and his performance reviews contained criticisms. The court, however, concluded that there was evidence from which a jury could find that the company's proffered reasons for termination were untrue. Specifically, Sandell's performance reviews were positive overall, the chief executive officer told him that if he did not make a full recovery, the company had the right to fire him, and had asked him when he was "going to get rid of the cane" and "drop the dramatization."

Recent administrative agency developments reaffirm the potentially high price tag on disability violations. In November 2010, the Department of Fair Employment and Housing reached a $6 million settlement — the largest in its history — with a cell phone company arising from allegations that it violated the California Family Rights Act by failing to approve certain employees' requests for leaves of absence, disciplining and terminating employees who went on leave, and failing to reasonably accommodate those employees.

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In October 2010, the department announced a $210,000 settlement of a disability discrimination case filed against a medical center by a nurse who sued for failure to reasonably accommodate and unlawful termination. The nurse alleged that although the medical center initially accommodated her work-related stress injuries, the center subsequently refused to allow her to return to work after she underwent surgery, instead placing her on a permanent leave of absence. In addition to compensating the plaintiff for her lost wages and emotional injuries, the settlement required the medical center to provide disability discrimination prevention training.

That same month, the Fair Employment and Housing Commission found a rental car company liable for discriminating against an employee suffering from anxiety and post-traumatic stress disorder. Instead of accommodating the employee's request for a reduced work schedule, the company placed her on unpaid leave for five months. Shortly after she returned to work, the company selected her as one of four employees to include in its layoffs. The Commission awarded approximately $90,000 in damages and fines, determining, among other things, that the company failed to communicate with her in good faith to accommodate her disability.

In light of these cases and the growing number of disability-related lawsuits, employers can reduce their risk of liability by better understanding their basic legal obligations and putting into practice some of the tips below.

Upon learning of an employee's disability, engage in a good-faith interactive process. Once a disabled employee requests an accommodation or the employer recognizes the need for an accommodation, the employer has an affirmative duty to engage in a dialogue with the employee to determine a reasonable accommodation. Importantly, no "magic words" are necessary to trigger the employer's affirmative duty. For example, in each of the following scenarios, the duty would attach: an employee asks to be allowed to take more breaks during the workday so that she can self-administrate shots for her diabetes; an employee asks for several weeks off to undergo and recuperate from surgery; an employee tells a supervisor that his wheelchair does not fit under his desk.

An employer's duty to engage in the interactive process is ongoing. As a result, if additional or different accommodations are needed, the employer has a duty to continue communicating with the employee to determine whether such accommodations can be provided.

Provide a reasonable accommodation to a disabled employee, unless doing so would impose an undue hardship. If an employer learns of an employee's disability or perceives the employee to have a disability that impacts the employee's job performance, the employer has an affirmative duty to make a reasonable accommodation to enable the employee to perform the job's essential functions, unless the accommodation would produce an undue hardship on the employer. Reasonable accommodations can include reassignment to a vacant position; establishing a part-time work schedule; purchasing equipment to help the employee perform the job's essential functions; allowing a leave of absence; and adjusting workplace policies to accommodate the needs of disabled employees. The undue hardship analysis considers whether an accommodation would require significant difficulty or expense, considered in light of the employer's financial resources and type of operations. As with the interactive process, the duty to reasonably accommodate a disabled employee is ongoing.

As in *Roby*, a common pitfall is maintaining rigid office policies that fail to provide disabled employees with flexibility in complying with attendance or tardiness rules. Since some disabilities may hinder employees' ability to call in within a certain timeframe or may require them to be absent more often than the policies allow, their needs may require a divergence from those policies as an accommodation.

Ensure supervisors and human resources personnel are familiar with current employment laws, and provide disability discrimination prevention training. Disability discrimination prevention training is not legally mandated, but because the law imposes significant affirmative duties on employers once they learn that a disabled employee may require reasonable accommodation, employers would be well-served in training their supervisors and human resources professionals about what could constitute disability discrimination and how to respond to requests for reasonable accommodations. Anti-disability discrimination training is particularly important for employers with 50 or more employees, because in addition to state and federal anti-discrimination laws, those employers are also subject to the requirements of the Family Medical Leave Act and the California Family Rights Act.

In today's economy, employees are staying in the workforce longer, increasing the likelihood of medical issues arising on the job. It is therefore more important than ever that employers understand disability-related employment laws so that they can help their disabled employees be a productive part of their workforce, prevent discrimination, and avoid costly lawsuits.

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